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ABSTRACT

Changing needs in the courtroom have raised questions about the need for standards in court interpreter qualifications. In California, no formal training or familiarity with the legal system is required for certification, which is done entirely by language testing. The fact that often court interpreters are officers of the court may be inconsistent with the adversary system in litigation. If the interpreter were to be considered an extension of the client, a more just approach, procedural difficulties would have to be resolved and the ethical consequences for confidentiality, copyright, conflict of interest, and unauthorized practice of law would have to be considered. Legal interpreters and translators should also carry mandatory professional liability insurance. Some steps have been taken in the development of ethical standards for court interpreters and translators, but the resulting proposed statutes still raise some ethical and enforcement questions. Ethical standards cannot be achieved until an appropriate certification process is in place. Certification standards should include: (1) a bachelor's degree; (2) formal undergraduate language study; (3) some training in American legal procedure; and (4) periodic documentation of continued proficiency. The cost of these proposals would be justified by their contribution to legal justice. (MSE)

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COURT INTERPRETERS & TRANSLATORS: DEVELOPING ETHICAL AND PROFESSIONAL STANDARDS

a paper prepared for presentation at

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by

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The role of the language professional is an emerging one in modern society, in which cultural interchange, propelled by technological advance and political transformations, has outrun linguistic capabilities. Particularly is this true in the United States which, within this generation, has experienced and is experiencing an unprecedented in-migration of population--both legal and illegal, as defined by American immigration law.

These immigrants to the United States are often not able to communicate in English. Yet, as people everywhere, they become involved in disputes--disputes among themselves, disputes with others (who may or may not be English-speakers), and disputes with government authorities. Resolution of these disputes is, in many cases, committed to the courts. The phenomenon of the non-English speaker as party or witness to a legal dispute, thus, is increasing in the American judicial system.[1]

This phenomenon, in turn, raises questions about what standards, if any, we should expect from those who translate or interpret for the courts. How should they be selected? How trained? And, once chosen, what ethical standards should they be required to meet? Lawyers, after all, are required to adhere to their state codes of professional responsibility. Shouldn't the same be true of court interpreters and translators?[2]

Presently, the answers to those questions appear to minimal at best. We, at San Diego State University, are considering the creation of a joint certificate program in court interpretation and translation with California Western School of Law, a private, "free-standing" (i.e. not affiliated with an undergraduate campus) law school, with whom we have an institutional interchange agreement. Indeed, this paper is an outgrowth of my research into what we need to do to create such a certificate program.

The answer(s) to that question, as I discovered, is (are) (a) not much

and (b) you're on your own. For the federal courts Spanish language interpreters[3] are certified by examination through the Administrative Office of the Federal Courts. Interpreters in other languages are certified, also by examination, on an individualized, case-by-case basis.

In California, Spanish language interpreters may take an exam given by the State Personnel Board that qualifies them to apply to individual courts to become"recommended" court interpreters. The courts themselves may require additional tests. For Spanish and seven additional languages--Arabic, Cantonese, Japanese, Korean, Portugese, Tagalog, and Vietnamese--certification for administrative hearings is also available.

As a practicing member of the California and federal bars, I was somewhat disconcerted to discover that no formal training or familiarity with the legal system was required for certification, only the passing of an exam. So, I phoned my friend, Dr. Marilyn Frankenthaler, who runs what is probably the best court interpretation program in this country at Montclair State College in New Jersey--only to find that things weren't much more structured there.

Admission to court interpretation is much the same as in California--determined by examination. Court interpreters and translators in New Jersey have organized a professional association, the Association of Professional Legal Interpreters/Translators of New Jersey (APLIT-NJ).[4] But membership in the organization is open to anyone who demonstrates "that he/she is employed in the State of New Jersey in a capacity whose duties include legal interpreting/translating, either by official appointment or otherwise by virtue of the job they perform, be it full-time, part-time, or freelance." (Subcategories of Associate, Student, and Honorary membership are also provided for by the Association's By-Laws.) In other words, qualification

For membership in the organization is left to the determination of other agencies. Moreover, membership in APLIT-NJ is not required for appointment as a court interpreter.

Yet New Jersey appears to be well ahead of other states including California, in the organization of its court interpreters. Is this any way to build a profession? With all due respect, I submit that it is not, and I suggest that the following be considered, by way of developing professional and ethical standards for the legal linguist professional.

ETHICAL STANDARDS

Is the legal interpreter to be considered an organ of the court? Or an extension of the client? Presently, the position of court interpreters, both in New Jersey and California, is that the interpreter is an officer of the court. But is this consistent with the adversary system?

The practice of law is, in a very real sense, the manipulation of language. If a litigant is deprived of an interpreter of his or her own choosing, he or she may be as effectively hampered in presenting his or her case as if he or she were deprived of the right to select his or her attorney. After all, restating ideas in another language isn't a simple matter of word-by-word conversion. Language must convey the intended meaning, while retaining grammatical, syntactic, and idiomatic accuracy.

For similar reasons the translator on the so-called "business" side of legal practice (i.e. non-litigation) should be considered, just as the attorney, as an extension of the client. The client wants his own attorney, not opposing counsel, to draw up an agreement, in order to be sure that what he wants in the document is actually there. So, too, where the meaning of a document in a foreign language is at issue, the client wants his own translator to determine what the document actually says or may say.[5]

I recognize that treating the interpreter as an extension of the client

will mean that, in any case in which a language other than English is to play a role, both sides will need to have their own interpreter. This will create some problems of cost, although in a business setting all parties could agree to retain a single interpreter or translator, just as they may now agree to have a single attorney draft a particular document, such as a partnership agreement.[6]

In litigation, however, treating the interpreter as an extension of the client would also present some procedural difficulties. Would putative errors in interpretation be objectionable, just as violations of the evidentiary rules are objectionable? It seems to me that they should be. But, then, the court would need have its own interpreter to arbitrate the dispute. And who would raise the objection? The interpreter or the attorney? When would such an objection have to be made? Finally, the courts would have to work out (I hardly have the time in this presentation to do more than just suggest the problem.) whether the trial court's rulings on such objections to alleged interpretive errors are appealable grounds for reversal of the judgment.[7]

Nevertheless, it seems to me that, rather than strive for a probably unattainable impartiality, it is appropriate to treat the interpreter/translator as an assistant to counsel, much as paralegals are regarded. Not the least of my reasons is that, from such a conception, certain ethical consequences would follow.

Confidentiality: Like the paralegal, the legal linguist professional would be subject to the rules of confidentiality embraced by the attorney-client privilege. We have a well-developed body of case law surrounding this doctrine, and we should not have to create a new set of rules of confidence for an allegedly impartial officer of the court.

Copyright: In the literary field, translators usually own rights to

their own work. With legal material, however, no rights at all should be assigned to the translator.

Conflict of interest: As with confidentiality, there is a corpus of judicial decision that could be applied directly to legal interpreters and translators, if they were analogized to professional legal assistants, rather than being treated as impartial officers of the court. For example, an interpreter who had previously worked for the other side in a related matter would, without any imputation of wrongdoing, be automatically disqualified from participation in a subsequent case. To proceed on the theory that the interpreter was "impartial" in the first matter and, therefore, may be expected to be impartial in this one, I think, places the interpreter in an impossible situation.

Or, to take another example, the legal interpreter would become subject to the "attorney/witness" rule. This canon holds that one shall not be an advocate and a witness (except as to a few, limited, minor, and very formal matters) in the same cause. If faced with a choice between the two roles, the attorney's conflict is to be resolved in favor of being a witness and withdrawal as counsel. Should not the same choice govern the behavior of legal interpreters?

Unauthorized practice of law: Treating the interpreter/translator as part of a team (including attorney, legal assistant, interpreter, legal secretary, and possible expert witnesses) would also resolve (by avoidance) the linguist's problem of engaging in the unauthorized practice of law. It is difficult, if not impossible, to understand how one can translate a legal document for a client without "explaining" it to him. Yet such explanation could be construed as the unauthorized practice of law, subjecting the interpreter to potential criminal and civil liability. But not if the interpreter is seen as an expert employed by counsel to assist in the pre-

paration of the client's case.

Finally, I would like to see a requirement that legal interpreters and translators carry mandatory professional liability insurance. In California we are presently fighting a battle over whether attorneys should be required to have malpractice coverage. All of the arguments against such a requirement strike me as fatuous--or, if they are to be taken seriously, then they argue for the repeal of the Penal Code, too. If attorneys should be required to carry professional liability coverage, as I believe they should be, then so, too, should legal interpreters and translators.

Steps in these directions, i.e. the development of ethical standards for court interpreters/translators have been taken. The New Jersey Association of Professional Legal Interpreters/Translators (APLIT-NJ) has developed a Code of Professional Responsibility for Interpreters, Transliterators and Translators that addresses many of the concerns, though not all, that I have raised.[8] Moreover, legislation is now pending in the New Jersey State Assembly that would incorporate some aspects the APLIT-NJ Code into statutory law.[9]

I have neither the time nor the space to engage in a detailed critique of either the New Jersey professional association's code or the pending legislation. Indeed, APLIT-NJ has raised several objections to the proposed statute, and it may be substantially revised before passage, if it is enacted at all. Copies of both the APLIT-NJ Code of Professional Responsibility and the pending bill are attached as appendices to this paper; the interested reader can review them and compare their provisions at his or her leisure.

For my purposes today I wish to draw attention to only two aspects shared by both the APLIT-NJ Code and the pending New Jersey legislation. First, both adopt the position that the legal interpreter/translator shall

be an "impartial" officer of the court, rather than an extension of the client or client's counsel. For reasons I have already put forward, I believe this to be an incorrect position not consonant with the actual operation of the American (adversary) legal system and one that only magnifies the difficulties in framing a code of professional conduct for court interpreters/translators.

Second, both the APLIT-NJ Code and the pending New Jersey legislation amount to little more than moral exhortations because they lack effective effective, organized enforcement mechanisms. The APLIT-NJ By-Laws create an Ethics Committee to police the Code of Professional Responsibility and provide for a variety of sanctions, including warnings, reprimands, and expulsion. But the sanctions lack any real teeth, because the organization has no control over who shall actually be appointed as legal interpreters/ translators. At best, APLIT-NJ can only publish to the appropriate judicial and administrative agencies the fact of a member's expulsion and hope the appointing agency will take this into account when making assignments. But it must be borne in mind that membership in the organization is not a prerequisite to service as a legal interpreter or translator in New Jersey in the first place. If one never joins the organization, one cannot be expelled, however grievous one's professional conduct.

The pending legislation is similarly inadequate. It relies on the court's power to punish for contempt as the means to discipline unprofessional or improper behavior by an interpreter/translator. But it provides no organizational mechanism by which such conduct outside the presence of the court, e.g., conflict of interest, shall be brought to the attention of the court. Moreover, any one familiar with the actual operation of the American judiciary must wonder what priority already overburdened magistrates will give to such

complaints, even if they are brought. Finally, the New Jersey legislation, providing as it does for professional sanctions without notice or hearing, may be subject to serious constitutional challenge on due process grounds.

From the deficiencies of these two well-meaning attempts to create standards of professional ethics for legal interpreters and translators it seems apparent that what is wanted is a professional organization, paralleling the organized bar, that, either by statute or rule of court, has the authority (1) to control admission to the profession of legal interpreter/translator, (2) to promulgate a code of professional conduct, and (3), subject to judicial (or administrative agency) ratification, to discipline members for transgression of the ethics rules.

PROFESSIONAL STANDARDS

It seems equally apparent that the foregoing cannot be achieved until there is some agreed upon certification process, some rite of passage, if you will. Although literally hundreds of translators and interpreters currently work in California on a full-time or part-time basis, few of them are trained to handle detailed legal translations or interpretations. To say you're a translator is one of the easiest things in the world to do, all you need are a few business cards.

Therefore, I would suggest that the following requirements become, either by legislative or judicial action, prerequisites to admission to the profession of legal linguist. Let me also, however, emphasize that I am a novice in this field; and, as a non-linguist attorney, I am willing to be educated as I go about designing a program for San Diego State University and California Western School of Law.

Let me also note that I am not proposing the following criteria to supplant an examination, but to supplement one. In fact, I believe that

the legal interpreter/translator should have to pass not only written and oral (at least for interpretation) exams in the subject language but also an examination in English designed to test the applicant's understanding of the meanings of American legal terminology. However, just as one must (generally speaking) have graduated from law school before one may sit for the bar examination, it seems reasonable to me to require that a candidate for certification as a legal interpreter/translator should be required to meet certain educational criteria before being permitted to take the certification examination. Indeed, I would hope that a Certified Legal Interpreter/Translator would become a recognized, standardized, and accredited academic certificate.

I suggest that such a certificate, like the most reputable paralegal certificates, should be a post-baccalaureate certificate. Perhaps the certificate might be incorporated into Master's degree level study in the language to be certificated. In any case, formal study of the language at the undergraduate level should be required: native fluency should not be enough.

Second, the certificated interpreter/translator should have some training in American legal procedure. Preferably this training would be acquired in a law school accredited by the American Bar Association. At a minimum this education would involve a class in legal structure and process (such as is routinely offered to foreign law students seeking the Master of Comparative Laws degree), classes in civil and criminal procedure, and a course in some substantive law field (e.g., contracts, torts, property, criminal law). For a specialization the certificate candidate might take one or two additional courses in a particular substantive field (e.g., advanced criminal procedure, international business transactions).

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And perhaps the certificate candidate should be required to participate in--or at least observe--the mock trial or client counseling competitions.

Finally, the certificated interpreter/translator should be required to demonstrate periodically continued proficiency in the language, either by examination or by documented travel to the country or region in which the particular language or dialect is spoken.

CONCLUSION

As I have before, I acknowledge that my outline for a curriculum for certification as a legal interpreter/translator is tentative. I look forward to input (being corrected in the error of my ways?) from those more familiar with the linguistic difficulties involved than I.

I also acknowledge that my proposals would, if adopted, cost money and raise the fees of trained court language professionals.[10] Speaking to a group of such professionals, I doubt that that will not be well-received. But I also note that the pending New Jersey legislation is not only a bill "concerning the selection, qualification, employment, and supervision of legal interpreters" but is also one "making an approrpiation therefore," including $300,000 to higher education for the development of curriculum materials and program, i.e. a response to a concern about which I have just spoken. To my mind, such an appropriation will contribute to the quality of legal justice in America and, thus, is money well-spent.

FOOTNOTES

1. See generally Diane Wagner, "The Fine Art of Translation," California Lawyer (June 1986), pp. 27-28 & 87-89.

2. Although the focus of this paper is upon those language professionals doing interpretation in or translation for courts, my observations about the professional training of and etchical standards for such persons need not be confined to a judicial setting. I believe they are equally relevant for those practicing before administrative agencies, particularly those agencies that conduct trial-type hearings, as well as those retained by private attorneys, as for example to translate a contract or interpret at a deposition.

3. Technically, translation usually refers to written material and interpretation refers to oral conversation. Throughout this paper, however, I use the terms interchangeably, although at some points from the context it will be apparent to the reader that I am referring to only one or another of these two functions.

4. A copy of the APLIT-NJ By-Laws is attached as Appendix I to this paper. I wish to thank Ms. Carmen S. Barros, President of the Association of Professional Legal Interpreters/Translators of New Jersey for kindly furnishing me with all of the materials that are attached as appendices to this paper.

In California there are at least two (competing?) associations of professional legal interpreters, but neither appears to have achieved either the membership (measured as a proportion of those practicing before the state's courts) or the organizational sophistication of APLIT-NJ.

5. See Godfrey Harris, Commercial Translations: A Business-Like Approach to Obtaining Accurate Translations (Los Angeles: Harris/Ragan Management

Corp., 1986).

6. Even in litigation, however, treating the interpreter as an extension of the client could hold costs down in that the client's own attorney (if certified in the language) could act as the interpreter. According to the New Jersey (proposed) legislation attached hereto as Appendix III, it would be improper for counsel to function as an interpreter; and, indeed, as a logical matter, it is, if we grant the assumption that the interpreter is to be a neutral and detached officer of the court. But is the premise supportable? It is difficult to see why attorneys should be permitted to function as the client's "mouthpiece" only so long as they speak in English. Besides, letting attorneys be their own interpreters might encourage more language study among prelaw and law students. And would that be all bad?

7. A related problem, well beyond the scope of this paper, but one interesting to contemplate is whether potential jurors should be subject to disqualification if they speak a language that will be interpreted in court. Judge Ernest Borunda of the South Bay Municipal Court in San Diego County, a judicial district with a largely Hispanic population contiguous to the United States-Mexico border, typically instructs jurors in such cases to base their decisions on the interpretation given in court, not on their own understanding of the language. One suspects that this is probably about as effective as most limiting instructions.

But, if linguistic understanding were to be grounds to challenge a prospective juror, what should be the level of competence necessary to warrant dismissal from the jury panel? Fluency? Conversancy? "I took Spanish 1 five years ago"? Is this a case where a little knowledge is a dangerous thing? Or is it a situation in which, as in others, the more you know the less likely you are to be acceptable for jury service?

8. A copy of the APLIT-NJ Code is attached as Appendix II to this paper.

9. New Jersey Assembly Bill No. 1911; a copy is attached as Appendix III to this paper.

10. Another possible outcome could be that larger law firms or those with specialized clienteles might begin to hire their own full-time translators/interpreters--or they might begin to consider language proficiency as a criterion in deciding whom to hire as new Associates; see footnote 6 supra.